APPENDIX A

[No. 47274-2. En Banc. January 15, 1982.]

THE STATE OF WASHINGTON, on the Relation of SHANA MARIE GOODNER, et al, Respondents, v. CHARLES WILLARD SPEED, Petitioner.

HICKS, J.--In a trial to the court, petitioner Speed was found to be the father of a child born out of wedlock and ordered to pay support and costs. He appealed to the Court of Appeals challenging the constitutionality of RCW 26.26.120, which defines a paternity suit as a civil action and states in subsection 5: "The trial shall be by the court without a jury." Petitioner's challenge is based on Const. art. 1, §21: "The right of trial by jury shall remain inviolate, . . ."

The Court of Appeals unanimously affirmed the trial court, rejecting petitioner's argument that in denying him a jury trial, RCW 26.26 violates the state's constitution. We affirm.

[1] The general rule as to state constitutional provisions protecting the right to jury trial is that they preserve the right in substance as it existed when the provision was adopted in the various states. 47 Am. Jur. 2d Jury §17 (1969); 50 C.J.S. Juries §10 (1947); State ex rel. Mullen v. Doherty, 16 Wash. 382, 47 P. 958 (1897). Since this constitutional guaranty is similarly worded and viewed in nearly all the states, we quote the following discussion by Judge Strong, later of the United States Supreme Court:

It is insisted that this act is repugnant to that clause in the declaration of rights in the constitution which guarantees "that trial by jury shall be as heretofore, and the right thereof remain inviolate." The objection is based upon a misconception of what that right of trial by jury was which is protected by the constitution. The founders of this state brought with them to their new abode the usages to which they had been accustomed in the land from which they emigrated. Among them was trial by jury. That mode of trial had long been considered the right of every Englishman, and it had come to be regarded as a right too sacred to be surrendered or taken away. Even in England it was fundamental or constitutional, so far as any right can be where there is no written frame of government. Its extent and its privileges, how and when it was to be enjoyed, were perfectly understood, and in bringing it with them the founders of the Commonwealth doubtless intended to bring it as they had enjoyed it. None of the frames of government or constitutions under which we have lived have contemplated any extension of the right beyond the limits within which it had been enjoyed previous to the settlement of the state or the adoption of the constitution. No intention to enlarge it appears in the laws

> agreed upon in England in 1682. . . . [The constitutional provision] look[s] to preservation, not extension. It is the old right, whatever it was, the one previously enjoyed, that must remain inviolable, alike in its mode of enjoyment and in its extent. What, then, was this right thus cherished and thus perpetuated? We inquire not now after the mode in which such a trial was conducted. Our business at present is to ascertain how far the right to a trial by jury extended--to what controversies it was applicable. It was a right the title to which is founded upon usage, and its measure is therefore to be sought in the usages which prevailed at the time when it was asserted.

Byers v. Commonwealth, 42 Pa. 89, 94 (1862).

The historical nature of the test as to what "right" to jury trial must remain inviolate is well stated in People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 287, 231 P.2d 832 (1951):

> It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution. It is necessary, therefore, to

> ascertain what was the rule of the English common law upon this subject in 1850.

Here, petitioner asserts that since this state's territorial legislature enacted a bastardy act elsewhere uniformly classified as a "civil" action, in the penal rather than civil code, thereby providing for a jury trial in filiation actions, he is constitutionally entitled to a jury trial in this case. Consequently, he contends RCW 26.26.120 should be struck down as unconstitutional. We disagree.

The territorial act, made a part of this state's statutory law at statehood by section 24 of the Enabling Act of February 22, 1889, ch. 180, 25 Stat. 676, was declared a nullity by this court in State v. Tieman, 32 Wash. 294, 73 P. 375 (1903). There, the act was challenged as invalidly enacted by the territorial legislature. the Tieman court determined that filiation proceedings were by all authority civil, giving rise to civil, not criminal liability. The court held that under the territory's Organic Act of March 2, 1853, ch. 90, 10 Stat. 172, the bastardy act was not properly enacted by the territorial legislature under the title: "'An act relative to crimes and punishments and proceedings in criminal cases.'" Tieman, at 295. The act was the second of a series of four intended to form the territory's general code, the others being a "'code of civil procedure,'" a "'probate practice act,'" and a "'justices' practice act.'" Tieman, at 295. In Tieman, this court, as the successor to the Territorial Supreme Court, concluded that the

bastardy act is "not, and never was, a valid enactment" (Tieman, at 298), since the territorial legislature violated the mandate of section 6 of the Organic Act, by enacting a civil law, not relating to "crimes and their punishment" (Tieman, at 296), under such a title.

The Organic Act above cited, was an act of Congress establishing the territorial government of Washington and empowering the territorial legislature to enact legislation in accordance with its provisions. Section 6 provides in part:

> SEC. 6. And be it further enacted, That the Legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. . . .And all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void. And all taxes shall be equal and uniform; and no distinctions shall be made in the assessments between different kinds of property, but the assessments shall be according to the value thereof. To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

(Some italics ours.)

The requirement that "every law shall embrace but one object, and that shall be expressed in the title" was violated when the bastardy act pertaining to a civil proceeding was enacted under the title "An Act relative to crimes and punishments and proceedings in criminal cases." Consequently, State v. Tieman, supra, held the bastardy act to be null and void as improperly enacted under section 6 of the Organic Act.

[2] It is the rule in this state that an invalidly enacted statute is a nullity. It is as inoperative as if it had never been passed. State ex rel. Evans v. Brotherhood of Friends, 41 Wn.2d 133, 247 P.2d 787 (1952). The natural effect of this rule, as countenanced by the Tieman holding, is that once the invalidly enacted statute has been declared a nullity, it leaves the law as it stood prior to the enactment. Boeing Co. v. State, 74 Wn.2d 82, 442 P.2d 970 (1968); 82 C.J.S. Statutes §75, at 132 (1953); 16 Am. Jur. 2d Constitutional Law §177, at 402 (1964).

This court previously considered with approval Tieman and its holding when it determined that later legislation on the subject of filiation did not "revive" the prior bastardy act. Quoting from State v. Coffey, 77 Wn.2d 630, 636, 465 P.2d 665 (1970):

> Washington's original bastardy statute was enacted as part of the Code of 1881 (Code of 1881, §1212 to §1221). . . .In 1903, State v. Tieman, 32 Wash. 294, 73 P. 375 (1903), this court held the act unconstitutional. A

search of the compilation of laws of the state discloses that in 1905 the 1881 act was dropped from the code of laws with the notation that it had been held unconstitutional. Pierce's Code §1839 (1905). Thereafter, the act completely disappears from the compilations of statutes. Between 1903 and 1919, there were no filiation or bastardy statutes in the state. When the legislature enacted Laws of 1919, ch. 203, p. 709, now RCW 26.24, it created an entirely new and complete filiation act. No reference was made to the 1881 act and understandably so--it had been "out of the books" for 14 years. The legislature was neither amending nor reviving an existing act.

[3] Since there was no common law duty for a father to support his illegitimate children, there could be no common law "right" to a jury trial regarding his paternity of such children. 94 A.L.R.2d 1128 (1964). The vast majority of the courts deciding this issue have so held. See for example State ex rel. Mayer v. Pinkerton, 185 Kan. 68, 340 P.2d 393 (1959); Commonwealth ex rel. Miller v. Dillworth, 204 Pa. Super. 420, 205 A.2d 111 (1964); Smeido v. Jansons, 23 App. Div. 2d 796, 259 N.Y.S.2d 169 (1965); McGlohon v. Harlan, 254 S.C. 207, 174 S.E.2d 753 (1970); Comish v. Smith, 97 Idaho 89, 540 P.2d 274 (1975); State ex rel. Williams v. Herbert, 96 Kan. 490, 152 P. 667 (1915).

Nevertheless, petitioner argues, without apposite supporting authority, that this court lacked authority to invalidate the bastardy act of 1881. He invites us now to overrule Tieman, thus reinstating the bastardy act as a valid territorial statute and thereby furnishing the basis for striking down the current statute, RCW 26.26.120, as unconstitutional. This we decline to do.

[4] The grant of authority to this court to consider matters growing out of territorial legislation as in Tieman is contained in sections 22 and 23 of the Enabling Act. Those sections provide for the transfer of territorial cases pending at the time Washington became a state, to the state courts or the federal courts "as the nature of the case may require". Enabling Act, at §22. Section 22 also provides:

> And each of the circuit, district, and State courts, herein named, shall, respectively, be the successor of the supreme court of the Territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts respectively with full power to proceed with the same, . . .

Since Congress intended that the state courts take over certain of the litigation pending in the territorial courts, it follows that as successor courts to the territorial courts the state courts would necessarily be required to construe territorial legislation in the course of deciding

such cases. The nature of the Tieman case indicated that it be brought before a state court, as was done, ultimately reaching the State Supreme Court.

The language of section 23 indicates that civil actions (as bastardy proceedings are correctly defined to be) shall be before state courts:

> [T]he courts established by such State shall, respectively, be the successors of said supreme and district Territorial courts;. . .That in all civil actions, causes, and proceedings, in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper State courts.

The bastardy act of the territory was properly reviewable by the State Supreme Court as the successor to the Territorial Supreme Court.

[5] As to the determination that the territoral enactment was a nullity because it did not comply with the requirements of the territory's founding legislation, the Organic Act of 1853, section 6 of that act, as set forth above, in very precise language compels such a result. Other than by the enactment of the bastardy act under the territorial penal code, a putative father

would not have been entitled to a jury trial at the time of the adoption of our state constitution. Since that act was held a nullity in Tieman, the 1976 act of the legislature, reqiring that paternity suits be tried to the court, does not violate Const. art. 1, §21.

The New Mexico Supreme Court held to the same effect in State ex rel. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957). Greenwood involved the right to jury trial based on territorial legislation subsequently found to be invalid by the State Supreme Court following statehood. The court held that later legislation eliminating the right to jury trial in certain contempt matters would not be deemed to violate the protective constitutional provision if the territorial legislation upon which the right was based was invalid.

In Greenwood, the New Mexico court determined that the territorial legislation was invalid as violative of the principle of separation of powers. Thus, even though the "right" to jury trial existed at the time the constitution of New Mexico was adopted, since it was based on an invalid enactment, later legislation eliminating the jury trial was upheld as constitutional.

The New Mexico court had not previously determined that the territorial legislation was a nullity, but did so in Greenwood, the case then before it. Here, the issue of the validity of the territorial legislation upon which petitioner bases his argued right to jury trial was long ago decided

adversely to him in State v. Tieman, 32 Wash. 294, 73 P. 375 (1903).

Finally, petitioner argues that this court recognized the constitutional right to trial by jury in filiation proceedings in State v. Kratzer, 70 Wn.2d 566, 424 P.2d 316 (1967). The Kratzer court held under the rule then prevailing that defendant had not waived his right to jury trial by failing to file timely a jury demand since the State faled to give timely notice of the trial date.

Kratzer was concerned with RCW 26.24, the filiation act, which was the predecessor to RCW 26.26, the Washington Uniform Parentage Act, at issue here. RCW 26.24 provided for jury trial in filiation proceedings. The issue before us, that is the power of the legislature to provide that trial of filiation matters be to the court without a jury, was not before the court in Kratzer. Thus the Kratzer court did not address the issue of whether a jury trial was constitutionally required in the face of legislation specifying that such actions be tried to the court. We now address that issue and hold a jury trial is not constitutionally required.

Affirmed.

BRACHTENBACH, C.J., and ROSELLINI, STAFFORD, UTTER, DOLLIVER, WILLIAMS, DORE, and DIMMICK, JJ., concur.

SEC. 6. And be it further enacted, That the Legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents. All the laws passed by the Legislative Assembly shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect: Provided, That nothing in this act shall be construed to give power to incorporate a bank or any institution with banking powers, or to borrow money in the name of the Territory, or to pledge the faith of the people of the same for any loan whatever, directly or indirectly. No charter granting any privileges of making, issuing, or putting into circulation any notes or bills in the likeness of banknotes, or any bonds, scrip, drafts, bills of exchange, or obligations, or granting any other banking powers or privileges, shall be passed by the Legislative Assembly; nor shall the establishment of any branch or agency of any such corporation, derived from other authority, be allowed in said Territory; nor shall said Legislative Assembly authorize the issue of any obligation, scrip, or evidence of debt, by said Territory, in any mode or manner whatever, except certificates for service to said Territory. And all such laws, or

any law or laws inconsistent with the provisions of this act, shall be utterly null and void. And all taxes shall be equal and uniform; and no distinctions shall be made in the assessments between different kinds of property, but the assessments shall be according to the value thereof. To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby authorized to form constitutions and States governments for said proposed states, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits

owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

Third. That the debts and liabilities of said Territories shall be assumed and paid by said States, respectively.

Fourth. That provision shall be made for the establishment and

maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.

SEC. 22. That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States upon any record from the supreme court of either of the Territories mentioned in this act, or that may hereafter lawfully be prosecuted upon any record from either of said courts may be heard and determined by said Supreme Court of the United States. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the circuit or district court hereby established within the State succeeding the Territory from which such record is or may be pending, or to the supreme court of such State, as the nature of the case may require: Provided, That the mandate of execution or of further proceedings shall, in cases arising in the Territory of Dakota, be directed by the Supreme Court of the United States to the circuit or district court of the district of South Dakota, or to the supreme court of the State of South Dakota, or to the circuit or district court of the district of North Dakota, or to the supreme court of the State of North Dakota, or to the supreme court of the Territory of North Dakota, as the nature of the case may require. And each of the circuit, district, and State courts herein named, shall, respectively, be the successor of the supreme court of the Territory, as to all such cases arising within the limits embraced within

the jurisdiction of such courts respectively with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of either of the Territories mentioned in this act, in any case arising within the limits of any of the proposed States prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union.

SEC. 23. That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of either of the Territories mentioned in this act at the time of the admission into the Union of either of the States mentioned in this act, and arising within the limits of any such State, whereof the circuit or district courts by this act established might have had jurisidicton under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said Territory; and in respect to all other cases, proceedings and matters pending in the supreme or district courts of any of the Territories mentioned in this act at the time of the admission of such Territory into the Union, arising within the limits of said proposed State, the courts established by such State shall, respectively, be the successors of said supreme and district courts of said Territory; and in respect to all other

cases, proceedings and matters pending in the supreme or district courts of any of the Territories mentioned in this act at the time of the admission of such Territory into the Union, arising within the limits of said proposed State, the courts established by such State shall, respectively, be the successors of said supreme and district Territorial courts; and all the files, records, indictments, and proceedings relating to any such cases, shall be transferred to such circuit, district, and State courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause or proceeding now pending, or that prior to the admission of any of the States mentioned in this act, shall be pending in any Territorial court in any of the Territories mentioned in this act, shall abate by the admission of any such State into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district or State court, as the case may be: Provided, however, That in all civil actions, causes, and proceedings, in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper State courts.

SEC. 24. That the constitutional conventions may, by ordinance, provide for the election of officers for full State governments, including members of

the legislatures and Representatives in the fifty-first Congress; but said State governments shall remain in abeyance until the States shall be admitted into the Union, respectively, as provided in this Act. In case the constitution of any of said proposed States shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two senators of the United States; and the governor and secretary of state of such proposed State shall certify the election of the Senators and Representatives in the manner required by law; and when such State is admitted into the Union, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the State governments formed in pursuance of said constitituions, as provided by the constitutional conventions, shall proceed to exercise all the functions of such State officers; and all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively.

Sec. 1078. Issues of fact joined upon an indictment shall be tried by a jury of twelve persons, and the law relating to the drawing, retaining and selecting jurors, and trials by jury in civil cases, shall apply to criminal cases.

OF ILLEGITIMATE CHILDREN.

Sec 1214. When any woman residing in any county of the territory is delivered of a bastard child, or is pregnant with a child, which, if born alive, will be a bastard, complaint may be made in writing by any person to the district court of the county where she resides, stating that fact, and charging the proper person with being the father thereof. The proceeding shall be entitled in the name of the territory against the accused as defendant.

Sec. 1215. Upon the filing of the complaint, the clerk shall cause notice to be given to the person so charged as in an ordinary action.

Sec. 1216. From the time of the filing of such complaint, a lien shall be created upon the real property of the accused in the county where the action is pending, for the payment of any money and the performance of any order adjudged by the proper court: Provided, That no lien shall attach, until notice of the pendency of the action is filed in the auditor's office of the county where the real property is situated.

Sec. 1217. If the complaint is verified, the district judge may order an attachment to issue thereon without bond, which order shall specify the amount of property to be seized under the attachment, and may be revoked at any time by such judge or the district court, on a showing made to either for a revocation of the same, and on such terms as such court or judge may deem proper in the premises.

Sec. 1218. The prosecuting attorney, on being notified of the facts, shall prosecute the matter in behalf of the complainant.

Sec. 1219. The issue on the trial shall be "guilty" or "not guilty," and shall be tried as an ordinary action.

Sec. 1220. If the accused be found guilty, he shall be charged with the maintenance of the child in such sum or sums, and in such manner as the court shall direct, and with the costs of the suit; and the clerk may issue execution for any sum ordered, to be paid immediately, and afterwards, from time to time, as it shall be required to compel compliance with the order of the court.

Sec. 1221. The court may, at any time, enlarge, diminish or vacate any order or judgment rendered in the proceeding herein contemplated, on such notice to the defendant as the court or judge may prescribe.